



2003

## Oil, Gas and Mineral Law

Richard F. Brown

Follow this and additional works at: <https://scholar.smu.edu/smulr>

### Recommended Citation

Richard F. Brown, *Oil, Gas and Mineral Law*, 56 SMU L. Rev. 1825 (2003)  
<https://scholar.smu.edu/smulr/vol56/iss3/25>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

# OIL, GAS AND MINERAL LAW

Richard F. Brown\*

## TABLE OF CONTENTS

I. INTRODUCTION.....	1825
II. CONVEYANCING ISSUES.....	1825
III. OIL, GAS AND MINERAL LEASES.....	1830
A. LEASING.....	1830
B. LEASE TERMINATION.....	1833
C. POOLING CLAUSE.....	1838
D. ROYALTY CLAUSE.....	1842
E. DRAINAGE.....	1844
F. SURFACE RIGHTS.....	1845
IV. SEISMIC.....	1846
V. OPERATING AGREEMENTS.....	1849
VI. PIPELINES.....	1852
VII. ENVIRONMENTAL.....	1854
VIII. LITIGATION.....	1861

## I. INTRODUCTION

THIS article focuses on the interpretations of, and changes relating to, oil, gas and mineral law in Texas, from October 1, 2001, through November 1, 2002. The cases examined include decisions of courts of the State of Texas and the Fifth Circuit Court of Appeals.<sup>1</sup>

## II. CONVEYANCING ISSUES

*Exxon Corp. v. Breezevale Ltd.*<sup>2</sup> holds that an oral participation agreement for a 2 1/2% working interest is unenforceable under the statute of frauds.<sup>3</sup> Breezevale assisted Exxon for eighteen months in Exxon's pursuit of exploration rights in Nigeria. There was no formal agreement in place; and, at the last meeting between Breezevale and Exxon to discuss their relationship, the parties discussed both a services contract and a participation agreement. The parties' dispute as to whether an oral working

---

\* B.A., Rice University; J.D., Southern Methodist University. Attorney-at-Law, Brown & Fortunato, P.C., Amarillo, Texas.

1. This article is devoted exclusively to Texas law. Cases involving questions of oil, gas and mineral law, decided by courts sitting in Texas but applying laws of other states, are not included.

2. *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429 (Tex. App.—Dallas 2002, pet. filed).

3. *Id.* at 443.

interest agreement was reached at that meeting became the basis for Breezevale's lawsuit against Exxon.<sup>4</sup> The jury found the parties had entered into an oral agreement and valued the interest at \$34.3 million.<sup>5</sup>

On appeal, Exxon defended by invoking the statute of frauds, which generally provides that a contract for the sale of real estate "is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged."<sup>6</sup> "Whether a contract falls within the statute of frauds is a question of law to be decided by the court."<sup>7</sup> Breezevale contended that the interest it was to acquire was in the nature of a contractual right to a share of the production. Therefore, Breezevale contended that it was not an interest in real estate and was not subject to the statute of frauds.<sup>8</sup>

The Dallas Appellate court held that "the relevant issue in determining whether the contract involves real estate is not whether title to minerals passes, but whether the interest is derived from rights to oil and gas in the ground, making the interest a realty interest subject to the statute of frauds."<sup>9</sup> The profits of land, including a working interest, a royalty interest, and an overriding royalty interest, are subject to the statute of frauds.<sup>10</sup> The court concluded that "the interest in this case derived from rights to oil in the ground and is a property interest subject to the statute of frauds."<sup>11</sup>

In *Greer v. J. Hiram Moore, Ltd.*,<sup>12</sup> the court determined that a "Mother Hubbard" clause in a deed will not convey a significant property interest not clearly contemplated by the language of the conveyance.<sup>13</sup> Greer and her three sisters each received a twenty-acre tract out of an eighty-acre tract owned by their mother.<sup>14</sup> Each sister received all of the surface, one-fourth of the minerals, and the executive rights on her own particular tract, as well as a one-fourth non-participating royalty interest in the other three tracts.<sup>15</sup>

Greer's tract was Tract 3. Greer's sisters leased Tracts 1 and 2, which were pooled into the SixS Frels Gas Unit. Greer conveyed her interest in the SixS Frels Gas Unit by a royalty deed that included a Mother Hubbard clause. Moore, as successor to Greer's grantee, claimed that the Mother Hubbard clause included Tract 3.<sup>16</sup> This particular form of

---

4. *Id.* at 434-35.

5. *Id.* at 435.

6. *Id.* at 435-36 (quoting TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2002)).

7. *Exxon*, 82 S.W.2d at 436 (citing *Gerstacker v. Blum*, 884 S.W.2d 845, 849 (Tex. App.—Dallas 1994, writ denied)).

8. *Id.*

9. *Id.*

10. *Id.* at 436-37.

11. *Id.* at 437.

12. *Greer v. J. Hiram Moore, Ltd.*, 72 S.W.3d 436 (Tex. App.—Corpus Christi 2002, pet. filed).

13. *Id.* at 441.

14. *Id.* at 437.

15. *Id.* at 438.

16. *Id.*

Mother Hubbard clause included "all of grantor's royalty and overriding royalty interest in all oil, gas and other minerals in the above named county or counties, whether actually or properly described herein or not . . . ." <sup>17</sup>

Moore claimed everything Greer owned in Wharton County.<sup>18</sup> Moore cited a number of cases that upheld grants of interests within specified areas.<sup>19</sup> The court distinguished these cases because in each case the deed at issue clearly showed that the grantor intended to convey *all* of his interests in the specified area.<sup>20</sup> Because Greer's deed contained a specific description of the pooled unit, a specified area which did not include Tract 3, the court found that Moore's cases were inapplicable and applied the established interpretation of Mother Hubbard clauses.<sup>21</sup> The leading case is *Jones v. Colle*,<sup>22</sup> which holds that Mother Hubbard clauses are limited to minor interests that are unambiguously intended to be part of larger conveyances.<sup>23</sup> The property interest in Tract 3 was significant; and, therefore, the Mother Hubbard clause did not convey Tract 3.<sup>24</sup>

*Hanzel v. Herring*<sup>25</sup> holds that the deeds from a sheriff's sale were void because the property descriptions contained in them were inadequate.<sup>26</sup> The descriptions used in the sheriff's deeds were in the following format:

Tract #1 .025000 Overriding Royalty Interest, Crumpton-Williams Wells, Lease 1404, Texas Railroad Commission Number 19281, T. H. Wooley Survey, Abstract 1634 and James Karcher Survey, Abstract 276, Palo Pinto County, Texas (Tax Account Numbers 140420007515, 1404200075151).<sup>27</sup>

The proponents of the deed presented evidence from a former employee of the Texas Railroad Commission.<sup>28</sup> He testified as to Railroad Commission practices in numbering leases and identified certain commission documents he used to identify the land. However, because no lease was in the record, the court found the description inadequate.<sup>29</sup> Whether including the lease in the record would have saved the legal description is unclear, but it is clear that using Railroad Commission lease numbers will not, by themselves, constitute an adequate legal description.

*Moore v. Energy States, Inc.*<sup>30</sup> applies the strip-and-gore doctrine, estoppel by deed, and the appurtenances doctrine in a deed construction

---

17. *Id.*

18. *Id.* at 438.

19. *Id.* at 439-40.

20. *Id.* at 440.

21. *Id.*

22. *Jones v. Colle*, 727 S.W.2d 262 (Tex. 1987).

23. *Greer*, 72 S.W.3d at 441.

24. *Id.*

25. *Hanzel v. Herring*, 80 S.W.3d 167 (Tex. App.—Fort Worth 2002, no pet.).

26. *Id.* at 172.

27. *Id.* at 171.

28. *Id.* at 172.

29. *Id.* at 171-72.

30. *Moore v. Energy States, Inc.*, 71 S.W.3d 796 (Tex. App.—Eastland 2002, pet. denied).

case. At issue was a small strip of land containing ten to twenty-five acres located between a railroad right-of-way and a public road.<sup>31</sup> The deed in question recited that the entire tract conveyed was located "South of the T. & P. Ry. Co. right of way and South of the Public road which lies immediately south of said T. & P. Ry. Co. right of way."<sup>32</sup> Plaintiffs sought to recover for drainage from the contested strip. Defendants prevailed on summary judgment.<sup>33</sup>

The judgment was affirmed on three grounds. Under the strip-and-gore doctrine, a narrow strip of land adjoining a conveyed tract which ceases to be of use after the conveyance will be presumed to be included in the conveyance, unless the grantor explicitly reserves the strip in plain and specific language.<sup>34</sup> Moreover, "when a deed conveys land abutting a street, public highway, or railroad right-of-way, title to the center of the street, public highway, or railroad right-of-way also passes by the deed."<sup>35</sup> The Eastland Appellate court held that any "land that may lie between the two rights-of-way was not expressly reserved;" and, therefore, the doctrine of strip-and-gore applied.<sup>36</sup>

Because the deed recited "that the public road 'lies immediately south' of the railroad right-of-way," the plaintiffs were "estopped from denying that the public road lies immediately south of the railroad right-of-way."<sup>37</sup> Estoppel by deed precluded any claim to title to the land between the public road and the railroad-right-of-way.<sup>38</sup> The deed also granted all "rights and appurtenances thereto."<sup>39</sup> The court held that "appurtenances" would include the public road and railroad rights-of-way.<sup>40</sup>

*Wilderness Cove, Ltd. v. Cold Spring Granite Co.*<sup>41</sup> is a case of first impression holding that the deed in question created a severable, dominant mineral estate in granite.<sup>42</sup> Grantors owned an undivided one-half interest in the property, when, by an 1890 deed ("Granite Deed"), they conveyed:

[A]ll of our interest in and to the Granite on the . . . land together with the necessary right of way to the extent of any interest in the same for constructing a Rail Road and for quarrying and handling the said Granite.<sup>43</sup>

---

31. *Id.* at 798.

32. *Id.*

33. *Id.* at 797.

34. *Id.* at 799.

35. *Id.* at 799.

36. *Id.* at 800.

37. *Id.*

38. *Id.*

39. *Id.* at 798.

40. *Id.* at 800.

41. *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*, 62 S.W.3d 844 (Tex. App.—Austin 2001, no pet.).

42. *Id.* at 849.

43. *Id.* at 845-46.

At the time of the litigation, Wilderness Cove owned all of the surface estate and an undivided one-half interest in the granite. Cold Spring owned an unspecified fractional interest in the granite derived from the grantee's interest under the Granite Deed.<sup>44</sup> Wilderness Cove began preparing the property for development as a lakefront property because thirty acres fronted on Lake LBJ.<sup>45</sup> Cold Spring asserted its rights to quarry the granite, which would make the property unsuitable for development as lakefront property.<sup>46</sup> The trial court held that Cold Spring was the owner of the granite as a cotenant and that Cold Spring had the right to develop the granite.<sup>47</sup> The judgment was affirmed.<sup>48</sup>

It is well established in Texas that a severance of oil and gas creates a "separate corporeal estate in the minerals."<sup>49</sup> In this case, the court extends that doctrine to specific conveyances of minerals other than oil and gas.<sup>50</sup> The "clear intent expressed in the Granite Deed was to convey the *in situ* granite deposit as a severable estate."<sup>51</sup> Wilderness Cove relied upon cases in which a general conveyance of minerals was held not to include building stone, which belonged to the surface estate as a matter of law.<sup>52</sup> The court rejected this argument because the Granite Deed was an "express conveyance of an *in situ* deposit of granite."<sup>53</sup>

The court also held that, even if the conveyance had been expressed as a general conveyance of "minerals," this particular granite would meet the test of qualifying as a mineral.<sup>54</sup> *Heinatz v. Allen*<sup>55</sup> holds that substances that might not be minerals in the "ordinary and natural meaning of the word," are minerals, if "they are rare and exceptional in character or possess a peculiar property giving them special value . . . ."<sup>56</sup> The granite in this case was the uniquely red granite from Burnet County that was being used for the construction of the new state capitol building in Austin, and the consideration paid in 1890 for the Granite Deed was approximately \$30 per acre, or \$200,000.<sup>57</sup> Furthermore, all the rules of presumed intent announced in earlier cases do not apply "when there is an express conveyance of a specific substance."<sup>58</sup>

---

44. *Id.* at 846.

45. *Id.*

46. *See id.*

47. *Id.* at 847.

48. *Id.* at 845.

49. *Id.* at 849.

50. *Id.*

51. *Id.*

52. *Id.* at 847-49 (citing *Moser v. United States Steel Corp.*, 676 S.W.2d 99, 102 (Tex. 1984); *Reed v. Wylie*, 597 S.W.2d 743 (Tex. 1980); *Reed v. Wylie*, 544 S.W.2d 169 (Tex. 1997); *Acker v. Guinn*, 464 S.W.2d 348 (Tex. 1971)).

53. *Wilderness Cove*, 62 S.W.3d at 849.

54. *Id.*

55. *Heinatz v. Allen*, 147 Tex. 512, 217 S.W.2d 994 (1949).

56. *Id.* at 518.

57. *Wilderness Cove*, 62 S.W.3d at 846.

58. *Id.* at 849 (quoting *Schwarz v. State*, 703 S.W.2d 187, 189 (Tex. 1986)).

The court found that the estate in the granite was a dominant mineral estate that included the "right to make necessary and reasonable use of the surface to remove the minerals."<sup>59</sup> Wilderness Cove argued that the issue was more complex, because the grantor in the Granite Deed was merely a cotenant in the property (owning an undivided one-half), and no cotenant could grant the right "to enter . . . and destroy the surface estate without the consent of all of the cotenants."<sup>60</sup> The court rejected Wilderness Cove's argument that "Cold Spring's only right was to receive a portion of the proceeds if Wilderness Cove ever chose to quarry and sell the granite."<sup>61</sup> Wilderness Cove owned a one-half interest in the surface, burdened by the Granite Deed.<sup>62</sup> Wilderness Cove also owned a one-half interest in the surface, not burdened by the Granite Deed, but subject to the rights of Cold Spring to develop its interest in the mineral estate. Cold Spring owned the right to partition. Cold Springs' severable granite estate is the dominant estate.<sup>63</sup>

### III. OIL, GAS AND MINERAL LEASES

#### A. LEASING

*Broughton Associates Joint Venture v. Boudreaux*<sup>64</sup> is a case involving waiver of the covenant of warranty of title in an exchange of a bank draft and an oil and gas lease. Lessee Broughton met with lessor Boudreaux to negotiate an oil and gas lease, which resulted in the contemporaneous exchange of an oil, gas and mineral lease for a bank draft for bonus consideration.<sup>65</sup> The executed lease contained a general warranty of title, and the bonus consideration for the lease was calculated at the rate of \$750.00 per acre for an estimated 399 net mineral acres.<sup>66</sup> The bank draft provided: "On approval of lease or mineral deed described hereon, and on approval of title to same by drawee not later than 15 banking days after arrival of this draft at collecting bank."<sup>67</sup>

Shortly after the funds to pay the draft had been wired to the Boudreauxs' bank account, Broughton discovered that the Boudreauxs owned substantially less than the 399 acres for which they had been paid. Broughton contacted the Boudreauxs requesting a refund of the overpaid amount, which the Boudreauxs refused. Broughton then filed suit.<sup>68</sup>

At trial, the court rendered a directed verdict on behalf of Broughton concluding that the Boudreauxs had breached their covenant of general

---

59. *Id.* at 849.

60. *Id.* at 850.

61. *Id.*

62. *Id.* at 846 n.4 and 850-51

63. *Id.* at 851.

64. *Broughton Assoc. Joint Venture v. Boudreaux*, 70 S.W.3d 324 (Tex. App.—Waco 2002, no pet.).

65. *Id.* at 326.

66. *Id.*

67. *Id.*

68. *Id.*

warranty of title and that Broughton had suffered damages as a result.<sup>69</sup> However, the court submitted to the jury the defensive issue of waiver, and the jury found that Broughton had waived the Boudreauxs' failure to comply with the warranty of title in the lease.<sup>70</sup>

On appeal, the court noted that the Texas Supreme Court had previously held that the provision "15 days after sight and upon approval of title" on the face of a draft made approval of title a condition precedent to formation of a contract."<sup>71</sup> Both parties agreed that the purpose of the fifteen-day provision in the Boudreaux was to afford Broughton an opportunity to check the title.<sup>72</sup> However, the court found that the funding of the draft waived the condition precedent; and thereafter, "Broughton could no longer exercise its right to approve title prior to its liability on the draft."<sup>73</sup> Broughton effectively lost the right to approve or disapprove title prior to paying. However, Broughton's suit was brought to enforce the covenant of warranty in the lease.<sup>74</sup>

The court observed "that a contemporaneously exchanged draft and deed must be construed together."<sup>75</sup> Yet the execution of a draft and deed does not always immediately create a binding bilateral contract, as the formation of a contract may be contingent on a condition precedent.<sup>76</sup> "When a promise is subject to a condition precedent, there can be no breach of contract until such condition or contingency is performed or occurs."<sup>77</sup> The court reasoned that the condition precedent in the draft "effectively protected Broughton from paying for the property if it disapproved of the title," and "thus, at the time of the exchange of the draft and the deed between Broughton and the Boudreauxs, there was no binding contract."<sup>78</sup>

A condition precedent may also be waived, and the waiver of a condition precedent may be inferred from the conduct of a party.<sup>79</sup> The Boudreauxs claimed that Broughton's funding of the draft constituted a waiver of the covenant of warranty of title in the lease.<sup>80</sup> The court disagreed with the Boudreauxs' argument, stating that for their argument to be valid, "the funding of the draft simultaneously created a bilateral contract (the lease) and waived an express provision of that same contract."<sup>81</sup> The court found that Broughton could not exercise its right to approve title prior to its liability on the draft, and because there was no binding

---

69. *Id.* at 327.

70. *Id.*

71. *Id.* at 328 (quoting *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987)).

72. *Id.* at 326.

73. *Id.* at 329.

74. *Id.* at 327.

75. *Id.* at 328.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*



contract between the parties until the draft was funded, Broughton could not have waived the right to enforce the covenant of warranty of title by funding the draft.<sup>82</sup> Consequently, since there could be no waiver of a contractual right when there is no contract yet in existence, the jury submission on waiver was improper.<sup>83</sup>

The significance of the case is that it confirms the general nature of a transaction involving a bank draft and a lease. There are few reported cases, but the industry's general understanding is supported by the case law.<sup>84</sup> The bank draft with the condition as to title gives lessee a window in which to approve or disapprove title without liability. After the window closes, the lease is no longer available. *Broughton* holds that once the draft is funded, the window closes and lessee's right to approve title prior to payment is waived.<sup>85</sup> However, funding of the draft does not waive a suit for breach of warranty based on the lease covenant. The case suggests that delay in enforcing the warranty may waive the covenant.

*Oakrock Exploration Co. v. Killam*<sup>86</sup> considers whether an offer to lease that is accepted by the landowner constituted an enforceable contract. Oakrock was attempting to lease a tract that was still subject to an unreleased lease owned by an operator in bankruptcy.<sup>87</sup> Oakrock sent an offer letter to the landowners as follows:

Oakrock Exploration Company ("Oakrock") proposes to offer you, and all of the remaining members of your family who own mineral interest under the 154 acre Oscar Ramirez tract in southern Zapata County, a bonus of \$300 per acre for a one-year Oil, Gas & Mineral Lease with a twenty [five] percent [25%] royalty on the acreage described and shown on the attached plat and lease description. (This lease is just south of the El Tigre Chiquito bridge approximately 20 miles south of Zapata, Texas).

\* \* \*

It is Oakrock's understanding that the operator of the existing well which is perpetuating the present Oil, Gas & Mineral Lease, Mustang Oil & Gas, has filed for Chapter 11 bankruptcy in Federal Bankruptcy Court. From the \$300 per acre bonus, we will pay a non-refundable bonus consideration of \$50.00 per acre until such time as a Release of the existing Oil, Gas & Mineral Lease is obtained from Mustang Oil & Gas . . . .

Oakrock will pay all legal expenses for Mr. George Person . . . to represent you and the rest of your family concerning the drafting of a new Oil, Gas & Mineral Lease to Oakrock, file all the proper motions, orders and a lawsuit, if necessary, to obtain Release of the existing Oil, Gas & Mineral Lease . . . . Additionally, Oakrock will pay

---

82. *Id.* at 329

83. *Id.*

84. *See, e.g.,* Sun Exploration & Prod. Co. v. Benton, 728 S.W.2d 35 (Tex. 1987).

85. *See* Broughton Assocs. Joint Venture v. Bourdeaux, 70 S.W.3d 324 (Tex. App.—Waco 2002, no pet.).

86. *Oakrock Exploration Co. v. Killam*, 87 S.W.3d 685 (Tex. App.—San Antonio 2002, pet. denied).

87. *Id.* at 687.

for all legal expenses for a federal bankruptcy attorney, if necessary, to force this issue through Bankruptcy Court.

It is our recommendation that a[n] Oil, Gas & Mineral Lease will be drawn up by Mr. Person (the "Oakrock Lease") and submitted to you for your review and approval. . . .

\* \* \*

Should the basic terms of this proposal be acceptable to you at this time, subject to your final review and acceptance of the terms and conditions of an acceptable Oil, Gas & Mineral Lease, then we would appreciate you signing and returning one (1) copy of this letter to my attention. . . .<sup>88</sup>

The letter was signed by the landowners, and the non-refundable fee was paid.<sup>89</sup> The landowners did not sign the lease.<sup>90</sup>

The court held that the subject matter of the offer letter was an oil and gas lease, and therefore, the offer had to contain the essential terms descriptive of the lease.<sup>91</sup> Among the essential terms to an oil and gas lease are the term of the lease, the drilling commencement date, time and amount of payments in lieu of drilling operations, and amounts to be paid for produced gas,<sup>92</sup> pooling, offset well obligations, and warranties.<sup>93</sup> Because the letters lacked these essential terms, the letters did not sufficiently identify the subject matter of the contract, and therefore, the letter was not enforceable as a contract.<sup>94</sup> The opinion is silent as to the effect of the partial performance represented by the payment of the non-refundable bonus.

The holding in the case suggests that an offer letter that does not include the complete form of the lease is not likely to be construed as an enforceable contract. The opinion is silent as to the effect of the language in the letter that made acceptance subject to "your final review and acceptance of the terms and conditions of an acceptable Oil, Gas & Mineral Lease . . . ."<sup>95</sup>

## B. LEASE TERMINATION

*Anadarko Petroleum Corp. v. Thompson*,<sup>96</sup> holds that a well capable of production will sustain a lease without additional drilling or reworking operations, even if actual production ceases for more than sixty days.<sup>97</sup> This is the first case to be decided among several important cessation-of-production cases that have recently reached the Texas Supreme Court.

---

88. *Id.*

89. *Id.* at 688.

90. *Id.*

91. *Id.* at 690.

92. *Id.* at 690-91 (citing *Smith v. Sabine Royalty Corp.*, 556 S.W.2d 365, 370 (Tex. Civ. App.—Amarillo 1977, no writ)).

93. *Id.*

94. *Id.* at 691.

95. *Id.*

96. *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550 (Tex. 2002).

97. *Id.* at 553.

The Texas Panhandle has been a hotbed of litigation brought by lessors alleging lease termination.<sup>98</sup> The alleged lease termination claims are typically based on Railroad Commission records showing no actual production for one or more cessations in excess of the permitted time interval under the lease cessation-of-production clause (typically sixty or ninety days). The cessation alleged is frequently attributable to a time twenty or thirty years prior to the filing of suit. The defendant lessee then has a serious evidentiary problem because of the difficulty inherent in producing any records or testimony as to the reason for a cessation which occurred so long ago.

In this particular case, it was undisputed that production totally ceased for sixty-one days in 1981 and ninety-one days in 1985 while the gas purchaser conducted pipeline repairs.<sup>99</sup> The lessor, Thompson, sued for termination of the lease and conversion damages.<sup>100</sup> The lessee, Anadarko, defended on the express language in the habendum clause of the lease. The court ultimately agreed with Anadarko. However, the opinion is very narrowly written, so that little else is decided except the construction to be given to the particular form of habendum clause found in this particular lease. The habendum in this lease provided: "This lease shall remain in force for a term of one (1) year and as long thereafter as gas is or can be produced."<sup>101</sup>

The lease's cessation-of-production clause was a typical sixty-day clause, which provided:

If, after the expiration of the primary term of this lease, production on the leased premises shall cease from any cause, this lease shall not terminate provided lessee resumes operations for drilling a well within sixty (60) days from such cessation, and this lease shall remain in force during the prosecution of such operations and if production results therefrom, then as long as production continues.<sup>102</sup>

There is a well established line of Texas cases holding that actual production is necessary to hold a typical Texas lease in force after the expiration of the primary term and any applicable cessation-of-production clause.<sup>103</sup> The previous cases all construed leases in which the habendum clause sustained the lease as long as oil or gas "is produced."<sup>104</sup> The court held that these cases were not controlling when the habendum clause includes the phrase or concept that the well need only be "capable of producing."<sup>105</sup> The court was particularly persuaded by the "plain language" of this habendum clause, but it also found that this construction

---

98. See, e.g., cases cited and reviewed in Richard F. Brown, *Oil, Gas and Mineral Law*, 55 SMU L. REV. 1219, 1222-29 (2002).

99. *Anadarko*, 94 S.W.3d at 553.

100. *Id.*

101. *Id.* at 553.

102. *Id.*

103. *Id.* at 554-55.

104. *Id.*

105. *Id.* at 556.

was consistent with and in harmony with the cessation-of-production clause.<sup>106</sup> The cessation-of-production clause contemplates the drilling of a new well, which would not make sense, if there was already a well capable of producing.<sup>107</sup> The court expressly held that “the cessation-of-production clause only applies if the lease would otherwise terminate under the habendum clause.”<sup>108</sup>

The court then defined a well as being “capable of production” if it is capable of producing in paying quantities without additional equipment or repairs. It expressly approved the following definition found in *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*<sup>109</sup>:

We believe that the phrase “capable of production in paying quantities” means a well that will produce in paying quantities if the well is turned “on,” and it begins flowing, without additional equipment or repair. Conversely, a well would not be capable of producing in paying quantities if the well switch were turned “on,” and the well did not flow, because of mechanical problems or because the well needs rods, tubing, or pumping equipment.”<sup>110</sup>

On motion for rehearing, the court clarified its holding by distinguishing this definition from existing case law defining “production in paying quantities.” For a well “to produce in paying quantities, or to be capable of producing in paying quantities, there must be facilities located near enough to the well that it would be economically feasible to establish a connection so that production could be marketed at a profit.”<sup>111</sup>

The case is significant because there are many existing lease forms employing the “capable of production” language, and perhaps now there will be even more. The case is also significant because it harmonizes the habendum clause with the cessation-of-production clause on the basis that a “savings clause” is only triggered when the lease is not otherwise held to be in force and effect. This is certainly conventional wisdom. It also comports with the evolution of the oil and gas lease in Texas, which is now a patchwork of savings clauses whose intended purpose is to ameliorate the harsh results of a cessation of production under a fee simple determinable lease.

The court did not reach any of Anadarko’s affirmative defenses, which included limitations, laches, quasi-estoppel, unjust enrichment, adverse possession, revivor, judicial estoppel and promissory estoppel.<sup>112</sup> The court remanded, rather than reversed, presumably because it expects the trial court to determine whether this particular well was “capable of pro-

---

106. *Id.* at 555.

107. *Id.* at 556.

108. *Id.* at 557.

109. *Hydrocarbon Mgmt., Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427, 427 (Tex. App.—Amarillo, 1993, no writ).

110. *Anadarko*, 94 S.W.3d at 557 (quoting *Hydrocarbon*, 861 S.W.2d at 433-34).

111. *Id.* at 559.

112. *Id.* at 557.

ducing.”<sup>113</sup> According to Anadarko’s brief, the evidence was undisputed that the well was capable of producing because the well was shut-in for pipeline repairs,<sup>114</sup> but the opinion is silent as to the assignment of the burden of proof. To the extent that a lessee is required to prove that a well was “capable” of producing many years ago, the proof problems may persist. However, it is presumably the plaintiff lessor’s burden to prove that the habendum clause was triggered, *i.e.* that the well was *not* capable of producing in paying quantities. Under this form of habendum clause, it appears that the proof problems are effectively transferred from the lessee to the lessor. Moreover, under this form of habendum clause, downstream interruptions (*e.g.* pipeline failures), will not cause a lease terminate.

*Guinn Investments, Inc. v. Ridge Oil Co.*<sup>115</sup> is a case of first impression extending the temporary cessation of production doctrine to protect a lessee of a nonproducing tract against a cessation of production from the producing tract, when both tracts are under the same lease. The 1937 lease covered two tracts of land. The leasehold in one tract was owned by Guinn, while the other was owned by Ridge. Although there had been no production on the Guinn tract since 1950, the lease stayed in effect during its secondary term by continuous production from the Ridge tract until 1997. In 1997, Ridge offered to purchase the Guinn tract in order to complete secondary recovery efforts from a waterflood. Guinn rejected this offer, leading Ridge to seek the property by other means. Intending to re-lease both tracts from the lessor, Ridge intentionally and voluntarily ceased production on the Ridge tract for ninety days in order to terminate the 1937 lease.<sup>116</sup> During the ninety-day cessation of production, Ridge wrote a letter to the lessor explaining his plan to re-lease the Guinn tract. In addition, Ridge voluntarily continued to pay royalties to the lessors during the stoppage. Ridge then obtained a new lease.<sup>117</sup>

At trial, the issue was whether the 1937 lease had terminated. The trial court granted summary judgment to Ridge.<sup>118</sup> On appeal Guinn’s main argument against cessation was that the temporary cessation of production (TCOP) doctrine kept the 1937 lease alive.<sup>119</sup> The TCOP doctrine generally holds that when production in the secondary term of a lease stops due to a stoppage in the well or a failure of equipment, or the like, and the lessee diligently acts to restore production, the lease will not lapse.<sup>120</sup>

---

113. *Id.*

114. *Id.*

115. *Guinn Invs., Inc. v. Ridge Oil Co.*, 73 S.W.3d 523 (Tex. App.—Fort Worth 2002, pet. granted).

116. *Id.* at 526.

117. *Id.* at 527.

118. *Id.*

119. *Id.* at 528.

120. *Id.* at 529.

Ridge contended that the TCOP doctrine only protects "operator" leases and not those whose interest is only held by the production of other operators.<sup>121</sup> In support of this argument, Ridge cited many cases in which the TCOP doctrine protected operator lessees from lapses.<sup>122</sup> No party cited any case in which the TCOP doctrine was specifically used to preserve the interest of a non-producing lessee whose interest was kept in effect by another's production. Thus, the court reviewed this issue as one of first impression.<sup>123</sup> Ridge also contended that Ridge's *voluntary* cessation of production could not give rise to the application of the doctrine.<sup>124</sup> Ridge finally contended that the surrendering of the original lease and act of taking a new lease effectively terminated the original lease.<sup>125</sup>

The court did not accept Ridge's arguments. Because production on any tract covered by the original lease perpetuated the lease for all the tracts, the TCOP doctrine applies to all tracts.<sup>126</sup> The court first reasoned that there was a long, well-established line of Texas cases holding that, "unless superseded by express provisions in a lease, production from any one part" of the lease "will perpetuate an oil and gas lease beyond the primary terms as to *all* tracts included in the lease."<sup>127</sup> The court found the case of *Cain v. Neumann*<sup>128</sup> to be particularly persuasive.<sup>129</sup> The *Cain* court "held that the lessor and the lessee could not by agreement between themselves release and thereby destroy the interests of the non-producing interests."<sup>130</sup> "The identity of the owner of the production is 'unimportant,' " with "the only relevant inquiry" being "whether production on any part of the land described by the lease continues."<sup>131</sup>

The court also determined that the doctrine is not limited to involuntary cessations of production.<sup>132</sup> Because Ridge had clearly stated in correspondence with the lessor that the cessation would last ninety days, and because he continued to pay royalties throughout the cessation, the court found that the cessation was clearly temporary.<sup>133</sup> The court also found that Ridge's surrender of the lease could not affect Guinn's lease. The court noted that there was not a surrender clause in the 1937 lease, and that one leaseholder could not surrender merely to destroy the interest of another leaseholder.<sup>134</sup>

Perhaps the most interesting part of the case was the court's discussion of the application of the TCOP doctrine to cessations caused by third

---

121. *Id.* at 529-30.

122. *Id.*

123. *Id.* at 530.

124. *Id.* at 532.

125. *Id.* at 535.

126. *Id.* at 531.

127. *Id.* at 530 (emphasis added).

128. *Cain v. Neumann*, 316 S.W.2d 915 (Tex. Civ. App.—San Antonio 1958, no writ).

129. *Id.*

130. *Guinn*, 73 S.W.3d at 530.

131. *Id.* at 531.

132. *Id.* at 532.

133. *Id.* at 533.

134. *Id.* at 536.

parties.<sup>135</sup> Reviewing the case law generally, the court concluded that the inquiry should be focused on the operator's intent with respect to restoring production, rather than the cause of the stoppage.<sup>136</sup> The court concludes that the doctrine is not limited to involuntary cessations or to physical or mechanical causes.<sup>137</sup> The only fair and just rule is to hold that the lease continues in force unless the period of cessation is for an unreasonable length of time.<sup>138</sup>

### C. POOLING CLAUSE

*Sabre Oil & Gas Corp. v. Gibson*<sup>139</sup> construes atypical pooling and minimum royalty provisions in an oil and gas lease. In 1957, Gibson's predecessor in interest executed an oil, gas, and mineral lease to Sabre's predecessor in interest.<sup>140</sup> The lease covered 38 separate tracts of land.<sup>141</sup> Gibson owned all of the minerals in three of the leased tracts, which Sabre acquired.<sup>142</sup> In April of 1997, Sabre drilled and completed a gas well on one of the three tracts.<sup>143</sup> On July 29, 1997, Sabre filed a Designation of Unit for the Gibson #1 Gas Unit, which pooled the Gibson's three tracts of land with other lands not part of the 1957 lease.<sup>144</sup> Gibson filed suit against Sabre and others seeking a declaration that the 1957 lease had terminated as to the Gibson's land and that the Designation of Unit was void because it was formed in violation of the 1957 lease.<sup>145</sup> The trial court denied Gibson's lease termination claim, while granting his unit designation claim.<sup>146</sup> The court of appeals reversed and remanded the trial court's latter finding.<sup>147</sup>

Sabre appealed the trial court's ruling that the Designation of Unit was void, arguing that the trial court erred in narrowly construing the pooling provision of the 1957 lease.<sup>148</sup> Paragraph 4 of the lease, the pooling provision, provided:

Lessee, at his option, is hereby given the right and power to pool or combine the acreage covered by this lease or any portion thereof, with other land, lease or leases in the immediate vicinity thereof, to comprise what is hereinafter called a "unit", when in Lessee's judgment it is necessary or advisable to do so in order properly to develop and operate said premises for the production of oil, gas or

---

135. *Id.* at 533-34.

136. *See id.* at 533.

137. *Id.*

138. *Id.* (citing *Frost v. Gulf Oil Corp.*, 119 So. 2d 759, 762 (Miss. 1960)).

139. *Sabre Oil & Gas Corp. v. Gibson*, 72 S.W.3d 812 (Tex. App.—Eastland 2002, pet. denied).

140. *Id.* at 814.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 816.

gaseous substances, including condensate.<sup>149</sup>

Additional provisions in paragraph 4a stated:

Notwithstanding any language in Paragraph "4" above, to the contrary, it is expressly agreed and understood by and between the parties hereto that before Lessee hereunder shall be allowed to pool or unitize any of the lands embraced by this lease with other lands not owned by the Lessor herein Lessee shall designate full units from the lands embraced by this lease first and in the event there is land in excess of a full unit remaining then same may be done in accordance with Paragraph "4" above.<sup>150</sup>

Gibson contended that under paragraph 4a, Sabre could not pool other lands not owned by the lessor until all of the lands embraced by the 1957 lease had been included in full units.<sup>151</sup> At the time Sabre filed the Designation of Unit, not all lands in the 1957 lease were included in units.<sup>152</sup>

The appellate court noted that "[i]n the absence of clear language to the contrary, pooling clauses should not be construed in a narrow or limited sense."<sup>153</sup> After harmonizing the provisions of the 1957 lease, the court found it to be an unambiguous instrument and found that the Designation of Unit was not formed in violation of the lease.<sup>154</sup> The court gave great weight to paragraph 8 of the lease (the general assignment clause), which provided, that "[t]he rights of either party hereunder may be assigned in whole or in part and the provisions hereof shall extend to the heirs, successors and assigns." The court reasoned that under paragraph 8, "a lessee who acquired only a portion of the lands covered by the 1957 lease would satisfy the requirements of paragraph 4a if the lessee included all of the tracts under the lease to which he has been assigned."<sup>155</sup>

More importantly, the record showed not only that these three tracts were the only land under the 1957 lease assigned to Sabre,<sup>156</sup> but also that Sabre included all of the tracts owned by the Gibsons in the Designation of Unit. Because all of the land that Gibson owned was included in the Designation of Unit, Sabre's creation of the Unit under the lease was valid.<sup>157</sup>

Gibson appealed the trial court's ruling that the 1957 lease did not terminate under the habendum clause.<sup>158</sup> Paragraph 2 of the lease stated:

---

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* (citing *Elliott v. Davis*, 553 S.W.2d 233 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); *Texaco, Inc. v. Lettermann*, 343 S.W.2d 726, 732 (Tex. Civ. App.—Amarillo 1961, writ ref'd n.r.e.)).

154. *Id.* at 817.

155. *Id.*

156. *Id.*

157. *See id.*

158. *Id.* at 818.



Subject to the other provisions herein contained, this lease shall be for a term of 5 years from this date (called the "primary term"), and so long thereafter as oil, gas or other mineral is produced from said land or unitized area hereunder, and as long as operations are prosecuted under the terms hereof.<sup>159</sup>

Gibson argued that because the 1957 lease is divisible as to each of the separate tracts, production was required on the three tracts owned by Gibson to hold the lease.<sup>160</sup>

The appellate court noted that "[t]he general rule is that production on one tract will operate to perpetuate the lease as to all tracts described therein and covered thereby."<sup>161</sup> Gibson, however, cited cases that "recognized that [a] lease may contain clauses for divisibility in which production will extend the life of the lease only as to that portion of the subdivided leasehold on which production is obtained."<sup>162</sup> Gibson then claimed that various provisions of the 1957 lease,<sup>163</sup> "when read together with the habendum clause indicate that the 1957 lease is not to be read as a single lease but, rather, as separate leases for each tract of land."<sup>164</sup> The court rejected Gibson's argument, observing that in each of the cases cited by Gibson, the lease in question "contained additional language modifying the habendum clause and providing for termination as to lands not included in a producing unit."<sup>165</sup> In Gibson's 1957 lease, no such language existed; therefore, the court reasoned that, "production was not required on each tract of land in order to extend the lease."<sup>166</sup> Thus, because there was production on the land included in the 1957 lease, the appellate court held that the lease did not terminate.<sup>167</sup>

Gibson also argued that the 1957 lease terminated under the rental clause.<sup>168</sup> Paragraph 5 of the lease provided that the lease would terminate if drilling operations were not commenced on or before a year from the date of the lease unless the lessee paid the lessor "the sum of One Dollar per acre for all mineral acres owned by lessors . . . which shall cover the privilege of deferring commencement of drilling operations for a period of twelve (12) months."<sup>169</sup> Paragraph 5a provided:

---

159. *Id.*

160. *Id.*

161. *Id.* (citing *Mathews v. Sun Oil Co.*, 425 S.W.2d 330 (Tex. 1968); *Sun Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277 (Tex. App.—Amarillo 1998, writ denied)).

162. *Id.* at 818-19 (citing *Riley v. Meriwether*, 780 S.W.2d 919 (Tex. App.—El Paso 1989, writ denied); *Gibson Drilling Co. v. B & N Petroleum, Inc.*, 703 S.W.2d 822 (Tex. App.—Tyler 1986, writ ref'd n.r.e.); *SMK Energy Corp. v. Westchester Gas Co.*, 705 S.W.2d 174 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); *Fisher v. Walker*, 683 S.W.2d 885 (Tex. App.—El Paso 1985, writ ref'd n.r.e.)).

163. *Id.* at 818. The provisions included paragraph 3, "a typical royalty clause;" paragraph 4a, an "atypical pooling clause addendum;" and paragraph 5a, "an atypical minimum royalty provision." *Id.*

164. *Id.*

165. *Id.* at 819.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

Lessee guarantees that the royalties and/or rentals payable under this lease shall equal or exceed a sum of money equal to One Dollar (\$1.00) per acre for each acre of land covered by this lease for each twelve month period during which this lease remains in force *and, notwithstanding any other provision contained in this lease, the Lessee binds himself*, his heirs, successors and assigns, *to pay a minimum rental each year while this lease remains in force equal to One Dollar (\$1.00) per acre for each acre of land covered by this lease*, and in the event the royalties payable by Lessee, his heirs, successors and assigns, shall amount to less than One Dollar (\$1.00) per acre for each acre of land covered by this lease during each twelve month period while this lease is in force, then and in such event, the difference between the amount paid and One Dollar (\$1.00) per acre for each acre of land covered by this lease for said period of time shall be paid by the Lessee, his heirs, successors and assigns, to Lessor, and *in the event of failure to make any such payment* (which payment shall be due not later than thirty (30) days after the expiration of any twelve month period during which this lease is in force) *when such payment is due shall terminate this lease as to both parties.*<sup>170</sup>

Relying on these provisions, Gibson urged that the emphasized language in paragraph 5a obligated Sabre to pay one dollar per acre in rental payments on all tracts where there is no production.<sup>171</sup> Or, in the alternative, Gibson claimed that the language "One Dollar (\$1.00) per acre for each acre" should be understood to mean that each mineral owner under the 1957 lease should receive a minimum of one dollar for each acre they own whether the production is from their lands or not.<sup>172</sup>

The appellate court disagreed, reasoning that "[a]fter the expiration of the primary term, the payment of rentals will not keep a lease in effect."<sup>173</sup> While "under the terms of the 1957 lease, the lessee was obligated to make a minimum royalty payment of one dollar per acre," the court held that "Paragraph No. 5a does not require a rental payment in addition to the royalty payment."<sup>174</sup>

Finally, in a procedural matter of some interest, the court ruled that the sixty other royalty owners in the unit were not necessary parties.<sup>175</sup> Although this holding appears to be *contra* to the well-established authority of *Veal v. Thomason*,<sup>176</sup> the court found that amendments to Rule 39 of the Texas Rules of Civil Procedure discarded the concepts of "necessary" and indispensable" parties.<sup>177</sup> Although those royalty owners "had an

---

170. *Id.* (emphasis in original).

171. *Id.*

172. *Id.*

173. *Id.* (citing *Tennant v. Matthews*, 19 S.W.2d 1115 (Tex. Civ. App.—Eastland 1929, writ ref'd)).

174. *Id.*

175. *Id.* at 815-16.

176. *Veal v. Thomason*, 138 Tex. 341, 159 S.W.2d 472 (1942).

177. *Sabre*, 72 S.W.3d at 815-16 (citing *Tex. Oil & Gas Corp. v. Ostrom*, 638 S.W.2d 231 (Tex. App.—Tyler 1982, writ ref'd n.r.e.); *Carper v. Holamich*, 610 S.W.2d 556, 557 (Tex. Civ. App.—Tyler 1980, writ ref'd n.r.e.)).

interest in that their share of the production from the pooled unit would be affected," their joinder "was not necessary."<sup>178</sup>

#### D. ROYALTY CLAUSE

*Neel v. Killam Oil Co.*<sup>179</sup> construes a disputed royalty deed, the Texas Division Order Statute, the statute of limitations applicable to unpaid royalty, and the obligation to pay interest on unpaid royalty. In 1945, when a nonparticipating royalty deed was executed, the land described in the deed was subject to an oil and gas lease that provided for a 1/8th royalty. That lease expired, and a new lease, providing for a 1/4th royalty, was executed in 1980.<sup>180</sup>

The royalty deed used several different fractions to describe the interest conveyed, and it was these differing fractions, coupled with the increased-royalty lease, that triggered the dispute. The royalty deed conveyed in the granting clause a nonparticipating royalty described as "an undivided one-half (1/2) interest in and to all of the oil royalty, gas royalty, royalty in casing head gas and gasoline . . . ."<sup>181</sup> The "existing lease" clause in the royalty deed made the conveyance subject to the existing lease, but recited that the conveyance "covers and includes one-half (1/2) of all the oil royalty, gas royalty, casing head gas and gasoline royalty, and royalty from other minerals or products, due and to be paid under the terms of the said lease . . . ."<sup>182</sup> Although not recited in the opinion, the royalty deed apparently included a 1/16th "fee development" clause and a 1/8th "minimum royalty" clause.<sup>183</sup> Finally, the deed included a 1/16th "future lease" clause, which read as follows:

In the event the present oil, gas and mineral lease or leases covering the above described property, or any part thereof, if there be any such lease or leases, terminate, lapse or is forfeited, then Grantee shall own and be entitled to receive as a free royalty [1/16th] . . . ."<sup>184</sup>

After the 1980 lease was executed, defendant lessees paid 1/2 of the royalty ( $1/2 \times 1/4 = 1/8$ ) to the nonparticipating owner.<sup>185</sup> Lessees relied upon *Alford v. Krum*,<sup>186</sup> in which the Texas Supreme Court held that "when there is an irreconcilable conflict between the clauses of a deed, the granting clause prevails over all other provisions."<sup>187</sup>

In 1991, the Texas Supreme Court rejected the *Alford* approach in *Luckel v. White*,<sup>188</sup> which required a "four corners" analysis of deeds with

---

178. *Id.* at 816.

179. *Neel v. Killam Oil Co.*, 88 S.W.3d 334 (Tex. App.—San Antonio 2002, pet. denied).

180. *Id.* at 338.

181. *Id.* at 337.

182. *Id.*

183. *Id.* at 340.

184. *Id.* at 338.

185. *Id.*

186. *Alford v. Krum*, 671 S.W.2d 870 (Tex. 1984).

187. *Neel*, 88 S.W.3d at 338 (citing *Alford*, 671 S.W.2d at 870).

188. *Luckel v. White*, 819 S.W.2d 459 (Tex. 1991).

provisions that contain conflicting fractional interests.<sup>189</sup> The defendant lessees concluded that, under *Luckel*, the nonparticipating royalty owner was only entitled to 1/16th.<sup>190</sup> The nonparticipating royalty owner refused to sign a new division order for a 1/16th interest, and the lessees suspended *all* payments to the nonparticipating royalty owner.<sup>191</sup>

After analyzing the “four corners” of the deed, the court concluded that the lessees were right—the nonparticipating royalty intended by the parties in the royalty deed under a new lease was a fixed 1/16th interest in production (and not 1/8th under the 1980 lease).<sup>192</sup> As to the unpaid 1/16th to which the nonparticipating royalty owner was entitled, a claim for unpaid royalty is a suit on a debt, and suit “is barred if it is not commenced within four years of the date the cause of action accrued.”<sup>193</sup> Therefore, the nonparticipating royalty owners were “barred from recovering any royalties that accrued more than four years before the date the suit was filed.”<sup>194</sup>

The defendant lessees contended they were not obligated to pay pre-judgment interest on the unpaid 1/16th under the Texas Division Order Statute.<sup>195</sup> Section 91.402(b)(1) of that statute specifies that “payments may be withheld without interest . . . when there is ‘a dispute concerning title that would affect distribution of payments.’”<sup>196</sup> Because the lessees did not dispute the nonparticipating royalty owner’s claim to a 1/16th royalty, the court held that there could not be a “dispute concerning title” for purposes of the statutory right to withhold payment without interest.<sup>197</sup> The nonparticipating royalty owner had refused to sign division orders for a 1/16th interest. The court did not accept the lessees’ contention that this refusal to sign the division order justified withholding payment without interest.<sup>198</sup> The court supported its decision by stating that if the nonparticipating royalty owner had signed the reduced-interest division order, doing so would waive the nonparticipating royalty owner’s claim to the larger interest.<sup>199</sup>

The court’s opinion on this point does not seem well reasoned. First, the title dispute was not whether the lessees disputed the nonparticipating royalty owner’s title. The title dispute was between competing claimants to funds that the lessee was attempting to pay to the rightful owner. There not only was a dispute, but this nonparticipating royalty owner lost the dispute. Second, while it is true that there was no apparent dispute to

---

189. *Neel*, 88 S.W.3d at 338.

190. *Id.*

191. *Id.*

192. *Id.* at 341.

193. *Id.* at 342 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 2002)).

194. *Id.* at 343.

195. TEX. NAT. RES. CODE ANN. § 91.402-.403 (Vernon 2001).

196. TEX. NAT. RES. CODE ANN. § 94.102(b)(1) (Vernon 2001).

197. *Neel*, 88 S.W.3d at 341.

198. *Id.* at 341-42.

199. *Id.* at 342.

a 1/16th interest, the lessee as a payor under the statute is still entitled to a signed division order before making payment. Section 91.402(c)(1)(C) of the Texas Division Order Statute<sup>200</sup> provides that “[a]s a condition to payment of royalties to a payee, a payor is entitled to receive a signed division containing certain provisions, among which is ‘the fractional and/or decimal interest in production claimed by [the] payee . . . .’”<sup>201</sup> It is apparently undisputed that the lessees received a division order as to a 1/8th interest, but never as to a 1/16th interest.<sup>202</sup> The whole concept behind division orders is to assure the payor that 100% of the proceeds are accounted for and not in dispute. If a 1/16th interest was not in dispute, the nonparticipating royalty owner should have signed a division order for that amount. Under the court’s reasoning, every payee could claim 100% of the royalty, and the lessee would be obligated to somehow divine the interest actually owned by each payee and pay them correctly. Third, the court’s opinion that signing such a division order would automatically waive the claim to the larger interest is unsupportable.<sup>203</sup> The court assumes the nonparticipating royalty owner would sign the division order without making it clear that the division order as to the reduced interest was signed without prejudice to the claim to the larger interest. A one sentence cover letter would eliminate any chance that accepting payment for the undisputed interest could be construed as a waiver. The court’s opinion does not promote the policy behind the statute of forcing competing payees to resolve their differences at their own expense, rather than at the expense of the payor. Nor does it promote the policy behind the statute of assuring payors that they may safely pay in accordance with division orders. If the payors are not insulated from the claims, then the payors will file suit and interplead the claimants, which just complicates the underlying dispute, increases costs, and fosters litigation. Suspension without interest is an incentive to the payees to promptly resolve their own disputes.

#### E. DRAINAGE

*Kerr McGee Corp. v. Helton*<sup>204</sup> is a drainage case brought by lessor Helton against lessee Kerr McGee for breach of the implied lease covenant to protect from drainage. Kerr McGee was the lessee on the drained tract as well as the offsetting producing tract.<sup>205</sup> Damages were based on what the hypothetical protection well on the drained tract would have theoretically produced, rather than the amount of gas drained by the draining well.<sup>206</sup> The court conceded that there may be some conflict as

---

200. TEX. NAT. RES. CODE ANN. § 91.402(c)(1)(C).

201. *Neel*, 88 S.W.3d at 341.

202. *Id.*

203. *Id.* at 341-42.

204. *Kerr McGee Corp. v. Helton*, No. 07-01-0263-CV (Tex. App.—Amarillo Jan. 28, 2002, pet. granted) (not designated for publication), 2002 WL 110433.

205. *Id.* at \*1.

206. *Id.* at \*5-6.

to the proper measure of damages.<sup>207</sup> However, because Kerr-McGee failed to specifically assign as error the measure of damages and only raised the issue as a “no evidence” point, the court avoided the legal question and simply found sufficient evidence upon which to affirm the judgment.<sup>208</sup> The court also affirmed prejudgment interest from the date suit was filed.<sup>209</sup>

#### F. SURFACE RIGHTS

*Exxon Corp. v. Pluff*<sup>210</sup> holds that the common lease clause giving lessee the right to remove equipment does not impose a duty to remove equipment, and that the cause of action for damage to the surface belongs only to the owner of the surface at the time the damage occurs.<sup>211</sup> Exxon drilled several wells on a small ten-acre tract during the 1930's and ceased all operations on the property in 1984.<sup>212</sup> Pluff purchased the surface in 1992 when the property was still cluttered with oilfield junk.<sup>213</sup> The trial court ruled that Exxon had a duty to remove the oilfield materials from the property, and the jury then found Exxon failed to remove the materials and awarded Pluff \$30,000 in damages.<sup>214</sup>

The appellate court relied heavily upon *Senn v. Texaco*<sup>215</sup> in finding that Pluff had no standing to sue.<sup>216</sup> Existing case law clearly establishes that “a cause of action for injury to real property accrues when the injury is committed,” “the right to sue is a personal right that belongs to the person who owns the property at the time of the injury,” and the right to sue “does not pass to a subsequent purchaser of the property” unless there is an express assignment of the cause of action.<sup>217</sup> “Consequently, a mere subsequent purchaser [of the property] cannot recover for an injury committed before his purchase.”<sup>218</sup> Pluff was critical of the holding in *Senn*, which “disregard[ed] the distinction between permanent and temporary injury to land.”<sup>219</sup> Nevertheless, the court held that “the *characterization* of the injury was not important; it was the *fact* of injury that was critical.”<sup>220</sup>

---

207. *Id.* at \*6 (citing *S.E. Pipe Line Co. v. Tichacek*, 977 S.W.2d 393, 399-400 (Tex. App.—Corpus Christi 1998), *rev'd on other grounds*, 977 S.W.2d 166 (Tex. 1999) and *Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 628-29 (Tex. Civ. App.—Beaumont 1966, writ ref'd n.r.e.)).

208. *Id.*

209. *Id.* at \*9.

210. *Exxon Corp. v. Pluff*, 94 S.W.3d 22, 24-25 (Tex. App.—Tyler 2002, pet. denied).

211. *Id.* at 30-31.

212. *Id.* at 24-25.

213. *Id.* at 25.

214. *Id.* at 26.

215. *Senn v. Texaco*, 55 S.W.3d 222 (Tex. App.—Eastland 2001, pet. denied).

216. *Exxon*, 94 S.W.3d at 27-28.

217. *Id.* (citing *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex. App.—Dallas 1986, writ ref'd n.r.e.); *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App.—Austin 1980, writ ref'd n.r.e.)).

218. *Id.*

219. *Id.* at 28.

220. *Id.* (citing *Lay*, 599 S.W.2d at 686) (emphasis in original).

The lease provided that "[Exxon] shall have the right at any time during or after the expiration of this lease to remove all property and fixtures placed by [Exxon] on said land including the right to draw and remove all casing."<sup>221</sup> Pluff contended that this clause imposed a duty on Exxon to remove oilfield materials.<sup>222</sup> The court refused to find an express duty, and relied upon *Warren Petroleum v. Monzingo*<sup>223</sup> in refusing to find an implied duty to remove oilfield materials.<sup>224</sup> There is no "implied duty to repair the damage done to the land caused by rightful and necessary use."<sup>225</sup>

#### IV. SEISMIC

*DDD Energy, Inc. v. Veritas DGC Land, Inc.*,<sup>226</sup> is a case involving indemnification for surface damages resulting from seismic operations. The landowner's original lessee conveyed interests in the oil and gas lease to three companies, one of which was DDD.<sup>227</sup> Lessee DDD then entered into an agreement for geophysical services on the landowner's land with seismic contractor Veritas. Included within the geophysical services agreement was an indemnity provision that provided that Veritas would indemnify lessee DDD for the negligent acts or omissions of Veritas in conducting seismic operations.<sup>228</sup> The agreement did not expressly provide that Veritas would indemnify DDD for DDD's own negligence.<sup>229</sup>

Upon discovering damage to his property, including the destruction of numerous oak and mesquite trees, the Landowner filed suit against lessee DDD.<sup>230</sup> DDD then brought suit against Veritas, seeking a declaratory judgment that Veritas was obligated to defend and indemnify DDD, under the terms of the parties' agreement.<sup>231</sup> Veritas moved for summary judgment, asserting that claims based on damage to the landowner's land caused by lessee DDD's own negligence were not covered by the indemnity clause, because the indemnity provision did not meet the express negligence test.<sup>232</sup> The trial court agreed with Veritas.<sup>233</sup>

On appeal, the court noted that "[u]nder the express negligence doctrine, a party contracting for indemnity from the consequences of its own negligence must express that intent in specific terms within the four cor-

---

221. *Id.* at 29.

222. *Id.*

223. *Warren Petroleum v. Mozingo*, 304 S.W.2d 362 (Tex. 1957).

224. *Exxon*, 94 S.W.2d at 30.

225. *Id.* (quoting *Monzingo*, 304 S.W.2d at 363).

226. *DDD Energy, Inc. v. Veritas DGC Land, Inc.*, 60 S.W.3d 880 (Tex. App.—Houston [14th Dist.] 2001, no pet.).

227. *Id.* at 882.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.* at 883.

233. *Id.*

ners of the contract.”<sup>234</sup> Consequently, “[i]ndemnity provisions that do not state the intent of the parties within the four corners of the instrument are unenforceable as a matter of law.”<sup>235</sup>

DDD contended that the express negligence test does not apply in this case because only Veritas was negligent, that the fair notice requirements were not applicable because Veritas had actual notice of the indemnity provision, and that, even if the express negligence rule applied as to negligence claims, it did not bar DDD’s request for indemnification as to the landowner’s other claims against DDD.<sup>236</sup>

Veritas argued that the indemnity clause did not meet the express negligence test and that the indemnity clause did not contain language indemnifying DDD from its own negligence as against a third party claim.<sup>237</sup> The court held that the indemnity provision failed the express negligence test.<sup>238</sup> However, as to those claims brought by the landowner against DDD which were not based on DDD’s negligence, the court held that Veritas was required to defend and indemnify DDD.<sup>239</sup> The court held that the express negligence rule did not apply to indemnification for those claims.<sup>240</sup>

*Taylor v. Brigham Oil & Gas, L.P.*<sup>241</sup> addresses liability for surface damages from seismic operations. Taylor leased the land for mineral exploration.<sup>242</sup> Brigham, after obtaining permission from a minority working interest owner, engaged Veritas Geophysical, Ltd., to conduct seismic exploration upon the property.<sup>243</sup> When Brigham and Veritas attempted to perform seismic operations, Taylor refused them entry, threatening to meet them with a shotgun.<sup>244</sup> Veritas sued for declaratory judgment, entered the property and conducted the exploratory operations.<sup>245</sup> Taylor counterclaimed for damages, claiming that the exploration encroached upon more of the surface than was reasonably necessary and that Veritas negligently and maliciously damaged portions of the surface estate.<sup>246</sup> Brigham and Veritas moved for summary judgment, contending that Brigham had a right to enter the property to conduct seismic operations and that Taylor had no evidence that they breached any duty owed to him, or that they acted with malice.<sup>247</sup> The trial court granted Brigham’s

---

234. *Id.* (citing *Fisk Elec. Co. v. Constructors & Assoc., Inc.*, 888 S.W.2d 813, 814 (Tex. 1994)).

235. *Id.* (citing *Fisk Elec.*, 888 S.W.2d at 814).

236. *Id.*

237. *Id.* at 884.

238. *Id.*

239. *Id.* at 885.

240. *Id.*

241. *Taylor v. Brigham Oil & Gas, L.P.*, No. 07-00-0225-CV (Tex. App.—Amarillo Jan. 16, 2002, no pet.) (not designated for publication), 2002 WL 58423.

242. *Id.* at \*1.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*



and Veritas' motion.<sup>248</sup>

The right to use the surface estate to explore for oil and gas is not an absolute one.<sup>249</sup> "Unless the parties agree otherwise, the entity performing the operations may not commit negligence nor use more of the surface than reasonably necessary."<sup>250</sup> However, "evidence that damage occurred to the surface while exploring for minerals alone is not evidence of negligence or unreasonably excessive use."<sup>251</sup>

Established law in Texas provides that the mineral estate is the dominant estate.<sup>252</sup> Ownership of the mineral estate includes the right to explore.<sup>253</sup> In addition, it is settled law that if in pursuing these rights, the servient surface estate is susceptible to use in only one manner, then the owner of the dominant estate may pursue that use irrespective of whether it results in damage to the surface, and the mineral owner is not liable for the damage.<sup>254</sup> The burden is on "the surface owner to establish that the [mineral owner] failed to use reasonable care in pursuing its rights or that the rights could have been pursued through reasonable alternate means sufficient to achieve the goal desired but without the damage."<sup>255</sup>

The court held that Taylor failed to establish that Brigham and Veritas acted negligently, or that they had made an unreasonably excessive use of the surface estate.<sup>256</sup> The court observed that Taylor failed to place into evidence any information describing what seismic exploration reasonably entails.<sup>257</sup> In addition, the court reasoned that Taylor failed to establish the goals sought to be achieved by Brigham and Veritas in conducting seismic operations, what effort was reasonably necessary to achieve such goals, and whether the goals could have been achieved through alternate, reasonable means which would not have resulted in any of the alleged damage.<sup>258</sup> Similarly, Taylor failed to prove that the damages allegedly committed were not the reasonable result of the seismic activities undertaken, or that the acts of either Brigham or Veritas were unreasonable.<sup>259</sup>

Thus, all Taylor provided was "evidence of purported damage arising from the activities of Brigham and Veritas," and because "proof of damages is not [by itself] evidence of unreasonable care or conduct," the appellate court held that the trial court correctly granted summary judgment in favor of the defendants.<sup>260</sup>

---

248. *Id.*

249. *Id.*

250. *Id.* (citing *Humble Oil & Ref. Co. v. Williams*, 420 S.W.2d 133, 134 (Tex. 1967); *Oryx Energy Co. v. Shelton*, 942 S.W.2d 637, 641 (Tex. App.—Tyler 1996, no writ)).

251. *Id.*

252. *Id.* at \*2 (citing *Tarrant County Water Control & Improvement Dist. v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993)).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at \*2-3.

257. *Id.* at \*2.

258. *Id.*

259. *Id.*

260. *Id.* at \*3.

## V. OPERATING AGREEMENTS

*Cone v. Fagadau Energy Corp.*<sup>261</sup> is a lengthy opinion construing and applying the A.A.P.L. Form 610-1982 Model Form Operating Agreement (“JOA”) in a dispute between the operator Fagadau Energy Corp. (“FEC”) and one of the small non-operators, Kenneth G. Cone.<sup>262</sup> FEC proposed a water flood and unitization, which was approved by all of the working interest owners, except Cone.<sup>263</sup> FEC proceeded despite Cone’s objections, and production was substantially increased.<sup>264</sup>

Article VII of the JOA titled “Expenditures and Liability of Parties” stated in relevant part:

VII.D.3. *Other Operations*: Without the consent of all parties, Operator shall not undertake any single project reasonably estimated to require an expenditure in excess of *Fifteen Thousand Dollars (\$15,000.00)* except in connection with a well, the drilling, reworking, deepening, completing, recompleting, or plugging back of which has been previously authorized by or pursuant to this agreement.<sup>265</sup>

The water flood exceeded \$15,000, and Cone relied upon this provision to assert that FEC could not institute the water flood without his consent.<sup>266</sup> The court rejected this argument and held that the contractual provision limiting expenditures did not limit each mineral owner’s underlying right as a co-tenant to extract minerals from common property without first obtaining the consent of his co-tenants.<sup>267</sup> “If a co-tenant owning a small interest in the land had to give his consent,” that small owner could “arbitrarily destroy the valuable quality of the land.”<sup>268</sup> The contractual provision only limited the expenditures that the operator could charge to the other owners. Although it may appear this provision limits activities in the Contract Area, it is only an accounting limitation, not a restriction on operations.<sup>269</sup> The court expressly rejected the holding in *Texstar North America, Inc. v. Ladd Petroleum Corp.*,<sup>270</sup> which found that a similar limitation (“Without the consent of all parties, no well shall be reworked or plugged back”) was a limitation on operations.<sup>271</sup> The extracting co-tenant would have to account to the non-extracting co-tenant under the usual rules applicable to co-tenancy.<sup>272</sup> The JOA contractual provision is simply “a limitation on the non-operator’s exposure to liability for ex-

---

261. *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147 (Tex. App.—Eastland 2001, pet. denied).

262. *Id.* at 152.

263. *Id.* at 151.

264. *Id.*

265. *Id.* at 157 (emphasis in original). These are blanks on the form JOA to be completed by the parties to the JOA.

266. *Id.*

267. *Id.* at 157-58.

268. *Id.* at 157.

269. *Id.*

270. *Texstar N. Am., Inc. v. Ladd Petroleum Corp.*, 809 S.W.2d 672, 675 (Tex. App.—Corpus Christi 1991, writ denied.).

271. *Cone*, 68 S.W.3d at 158.

272. *Id.* at 157 n.5.

penses incurred by the operator.”<sup>273</sup>

Cone also complained about the conversion of producing wells into water injection wells. He contended that under Article VI.E.2 of the JOA, the wells that were converted were abandoned, and that Cone should have been offered the right to assume control of the wells.<sup>274</sup> The operative language of the provision is the phrase, “any well which has been completed as a producer shall not be plugged and abandoned without the consent of all parties.”<sup>275</sup> The court rejected Cone’s argument, relying upon the basic meaning of “abandonment,” which involves a “relinquishment of possession.”<sup>276</sup> The wells continued to be used every day and continued to be used to produce hydrocarbons through the same intervals for which Cone was being compensated.<sup>277</sup>

The court also construed Art. V.A. of the JOA, which provides:

*V.A. Designation and Responsibilities of Operator.* [FEC] shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of this agreement. It shall conduct all such operations in a good and workmanlike manner, but it shall have no liability as Operator to the other parties for losses sustained or liabilities incurred, except such as may result from gross negligence or willful misconduct.<sup>278</sup>

Although the trial court held Cone to the higher standard of showing gross negligence or willful misconduct, rather than a simple breach of contract standard, the appellate court held that Cone’s claims were in the nature of an accounting, and therefore, were simple contract claims. The gross negligence/willful misconduct requirement only applied to claims that the operator failed to conduct operations in a good and workmanlike manner.<sup>279</sup>

*In re Riata Energy, Inc.*<sup>280</sup> holds that a suit brought for various causes of action by a non-operator against the operator, Riata, is not a suit to recover an interest in real property subject to the mandatory venue statute. The mandatory venue statute provides:

Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property, or to quiet title to real property shall be brought in the county in which all or a part of the property is located.<sup>281</sup>

---

273. *Id.* at 158.

274. *Id.* at 152-54.

275. *Id.* at 154.

276. *Id.*

277. *Id.*

278. *Id.* at 154-55 (emphasis in original).

279. *Id.*

280. *In re Riata Energy, Inc.*, No. 01-00-01138-CV (Tex. App.—Houston [1st Dist.] 2001, pet. denied) (not designated for publication), 2001 WL 1480291.

281. TEX. CIV. PRAC. & REM. CODE ANN. § 15.011 (Vernon Supp. 2001).

The non-operator sought damages for breach of contract and conversion and for a declaratory judgment. It sought "to recover monetary damages for breach of the joint operating agreement, fraud based on representations made in Riata's capacity as operator, and conversion of the hydrocarbons recovered from the wells."<sup>282</sup> These causes of action did not fall within the statute.<sup>283</sup>

*Saratoga Resources, Inc. v. Baker*<sup>284</sup> holds that the sale of an oil and gas property included any right to a refund of operating expenses incurred prior to the sale. Saratoga and Baker entered into an operating agreement for a gas gathering system and salt water disposal well in 1994.<sup>285</sup> The operating agreement provided that the expenses would be "borne 75% by Baker and 25% by Saratoga until other arrangements may be agreed to."<sup>286</sup> Baker added additional wells to the system in which Saratoga had no interest. Saratoga objected and requested an audit, and Baker refused any adjustment.<sup>287</sup> Saratoga then sold out to Prime Energy Corporation ("Prime"), and Saratoga conveyed to Prime "all accounts receivable . . . refunds, rights to refunds . . . in favor of, owing to, or possessed or controlled by the Saratoga Companies."<sup>288</sup> Based on a post-conveyance audit, Saratoga demanded that Baker pay Saratoga a refund in excess of \$100,000.<sup>289</sup> Baker and Prime worked out a different cost sharing arrangement for the future. Saratoga sued Baker for the refund. Prime quitclaimed to Saratoga all rights, if any, to recover a refund of operating expenses prior to the sale.<sup>290</sup>

The court held that Saratoga conveyed to Prime any claim Saratoga might have to a refund.<sup>291</sup> Prime and Baker then made an "other arrangement," as contemplated by the original Operating Agreement, to reduce Prime's operating expenses prospectively.<sup>292</sup> That agreement was silent as to Saratoga's claim. However, the operating agreement's sharing arrangement was in place until Baker and Prime changed it. There simply was no right to a refund.<sup>293</sup> The quitclaim deed from Prime to Saratoga was of no effect, because there was nothing to convey.<sup>294</sup>

---

282. *Riata*, 2001 WL 1480291 at \*3.

283. *Id.*

284. *Saratoga Res., Inc. v. Baker*, 59 S.W.3d 411 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

285. *Id.* at 412.

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.* at 412-13.

290. *Id.* at 413.

291. *Id.* at 414.

292. *Id.*

293. *Id.* at 414-15.

294. *Id.*

## VI. PIPELINES

It appears that pipeline companies are faced with confusion and conflicts among the lower courts concerning the "unable to agree" jurisdictional issue in pipeline condemnation cases. Pipelines derive their power of eminent domain from Texas Property Code section 21.012(a), which provides:

If . . . a corporation with eminent domain authority . . . wants to acquire real property for public use *but is unable to agree with the owner of the property on the amount of damages*, the condemnation entity may begin a condemnation proceeding by filing a petition in the proper court.<sup>295</sup>

The requirement that the condemning entity is unable to agree with the property owner on the amount of damages prior to instituting a condemnation proceeding has been held to be jurisdictional.<sup>296</sup> Several opinions on almost identical facts have recently been written on the meaning of this "unable to agree" requirement, with no clear resolution.

*Hubenak v. San Jacinto Gas Transmission Co.*,<sup>297</sup> out of the Houston court, focuses on the sole issue of the jurisdictional question of whether the pipeline company engaged in good faith negotiations and made bona fide offers as required by the statute.<sup>298</sup> The landowners' real objection was that they simply did not want the pipeline on their property.<sup>299</sup> The landowners fought the condemnation by contending that the pipeline company did not negotiate in good faith because its offers included the acquisition of three additional property rights the pipeline had no right to condemn: (1) the right to transport substances in addition to natural gas; (2) the obligation to warrant and defend title to the easement; and (3) the right to assign the easement to any person or entity.<sup>300</sup>

The court repeatedly emphasized that "[it] takes very little to satisfy the negotiate-in-good-faith requirement."<sup>301</sup> It found "the issue of whether [the pipeline] could actually condemn the three additional property rights [was] simply irrelevant."<sup>302</sup> The pipeline company negotiated for these rights, but never sought to condemn them. "A condemning entity, like any person or entity, is of course, free to negotiate for, offer to

---

295. TEX. PROP. CODE ANN. § 21.012(a) (Vernon 1984) (emphasis in original).

296. *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 71 S.W.3d 395, 397 (Tex. App.—Corpus Christi 2001, pet. granted).

297. *Hubenak v. San Jacinto Gas Transmission Co.*, 65 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2001, pet. granted).

298. *Id.* at 794. The opinion is an appeal of four separate cases on the same issue. Moreover, the Texas Supreme Court recently denied review on the same issue in *Hubenak v. San Jacinto Gas Transmission Co.*, 37 S.W.3d 133 (Tex. App.—Eastland 2001, pet. denied). In that case, under almost identical facts, the Eastland court held that neither the landowner nor the condemnor had established either the existence or lack of good faith. The case was remanded on the fact issue.

299. *Hubenak*, 65 S.W.3d at 794.

300. *Id.* at 795.

301. *Id.* at 798, 799-801.

302. *Id.* at 801.

buy, and buy what it desires.”<sup>303</sup> The appellate court upheld the trial court’s jurisdiction because the pipeline company made bona fide offers and further negotiations were futile.<sup>304</sup> In its original (withdrawn) opinion, this same court found that the condemnor’s failure to first make an offer including only those rights that it was authorized to acquire through a condemnation proceeding, amounted to a lack of good faith as a matter of law.<sup>305</sup>

*MidTexas Pipeline Co. v. Dernehl*,<sup>306</sup> out of the Texarkana court, addresses the same issue, but on facts where there was no evidence that the pipeline company had ever made an offer which comprehended only the rights it sought in condemnation.<sup>307</sup> The court held that “[o]ffers to purchase property that included the property to be condemned but going beyond that in acquiring additional rights or properties is not enough to satisfy a good faith negotiation.”<sup>308</sup>

*Cusack Ranch Corp. v. MidTexas Pipeline Co.*,<sup>309</sup> out of the Corpus Christi court, addresses the same issue and agreed with the analysis adopted earlier by the Austin court in *State v. Hipp*,<sup>310</sup> quoting with approval the following:

[A]ll that is required is that there shall be a bona fide attempt to agree with the owner, and that there shall be an honest disagreement between the parties as to the compensation which the one is willing to give and the other is willing to receive. A formal offer and refusal is not necessary. Nor is it necessary that there should be a series of offers or prolonged negotiations in order to agree on compensation; an effort to agree is all that is required; and it is sufficient if the negotiations proceed far enough to indicate that an agreement is impossible. If it is apparent that an effort to agree would be unavailing and an offer useless, none need be made. The statute does not contemplate an impossibility to purchase at any price, however large, but merely an unwillingness on the part of the owner to sell at all, or a willingness on his part to sell only at a price which in petitioner’s judgment is excessive . . . .<sup>311</sup>

Finally, in *ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*,<sup>312</sup> the

---

303. *Id.*

304. *Id.*

305. *Hubenak v. San Jacinto Gas Transmission Co.*, Nos. 01-99-00691-CV, 01-99-00959-CV, 01-99-01359-CV & 01-99-01360-CV (Tex. App.—Houston [1st Dist.] July 27, 2000) (not designated for publication), 2000 WL 1056416, at \*5, *withdrawn and superseded by* 65 S.W.3d 791 (Tex. App.—Houston [1st Dist.] 2001, pet. granted).

306. *MidTexas Pipeline Co. v. Dernehl*, 71 S.W.3d 852 (Tex. App.—Texarkana 2002, pet. granted).

307. *Id.* at 857.

308. *Id.* at 858.

309. *Cusack Ranch Corp. v. MidTexas Pipeline Co.*, 71 S.W.3d 395 (Tex. App.—Corpus Christi 2002, pet. granted).

310. *State v. Hipp*, 832 S.W.2d 71 (Tex. App.—Austin 1992), *rev’d on other grounds*, 867 S.W.2d 781 (Tex. 1993).

311. *Id.* at 77.

312. *ExxonMobil Pipeline Co. v. Harrison Interests, Ltd.*, 93 S.W.3d 188 (Tex. App.—Houston [14th Dist], pet. filed).

trial court dismisses ExxonMobil's condemnation proceeding for want of jurisdiction on the basis that "ExxonMobil failed to negotiate in good faith by requiring Harrison to grant it rights which ExxonMobil was not entitled to obtain in a condemnation proceeding."<sup>313</sup> Harrison then recovered almost \$400,000 in damages, professional fees, and costs.<sup>314</sup> The Houston court reversed.<sup>315</sup> The case before it presented a single offer, for a price far in excess of the appraised value, additional terms, and a landowner who never responded.<sup>316</sup> The general thrust of the opinion was to accept the low jurisdictional threshold test described in *Hubenak* and *Cusack*.<sup>317</sup>

*Pinnacle Gas Treating, Inc. v. Read*<sup>318</sup> holds that a landowner whose property was condemned for a gas pipeline easement can recover for lost profits from a chicken farm business that did not exist at the time of the condemnation. Pinnacle condemned a fifty-foot-wide permanent easement across Read's land.<sup>319</sup> Read had been in conversations with Sanderson Farms about building broiler houses for chickens on the 61.92 acres in question.<sup>320</sup> Part of the land was no longer usable for this purpose after the pipeline easement was taken. The broiler houses were constructed on other parts of the land.<sup>321</sup>

Section 21.044 of the Property Code authorizes the trial court to award the condemnee "the damages that resulted from the temporary possession" of the property, but does not define "damages."<sup>322</sup> The court held that damages under this provision "are not limited to the market or rental value of the property," and the court refused to exclude "use" of the land as part of damages.<sup>323</sup> Therefore, recovery for the lost profits of the planned chicken farm were recoverable.<sup>324</sup>

## VII. ENVIRONMENTAL

*Anthony v. Chevron USA, Inc.*<sup>325</sup> considers the use of expert testimony in a surface and groundwater contamination case. Plaintiffs alleged that Chevron had negligently polluted both the water and soil of the plaintiff's ranch, and that Chevron had used more of the ranch's surface estate than was reasonably necessary to conduct their operations.<sup>326</sup> At trial, the plaintiffs argued that Chevron's negligent use of oil and salt water injec-

---

313. *Id.* at 190.

314. *Id.* at 191.

315. *Id.* at 197.

316. *Id.*

317. *Id.* at 195.

318. *Pinnacle Gas Treating v. Read*, 69 S.W.3d 240 (Tex. App.—Waco 2002, pet. filed).

319. *Id.* at 242.

320. *Id.* at 244.

321. *Id.*

322. *Id.* (quoting TEX. PROP. CODE ANN. § 21.044 (Vernon 1984)).

323. *Id.* at 245.

324. *Id.*

325. *Anthony v. Chevron USA, Inc.*, 284 F.3d 578 (5th Cir. 2002).

326. *Id.* at 580.

tion wells, which were completed to a depth of around 3000 feet, resulted in the contamination of plaintiffs' water wells, which were drilled to a depth of about 50 feet below the surface.<sup>327</sup> The plaintiffs' water wells originally produced water suitable for human consumption; however, by 1988, tests revealed that the chloride levels and total dissolved solids in the water rendered the water undrinkable.<sup>328</sup> The plaintiffs also claimed at trial that oil spills and leakage from pipelines owned and operated by Chevron caused surface pollution on portions of the ranch.<sup>329</sup> At the close of the plaintiffs' case, Chevron moved for judgment as a matter of law.<sup>330</sup> The court granted Chevron's motion, concluding that the evidence failed to establish that Chevron caused the alleged surface and groundwater contamination on the ranch, and the evidence failed to establish the proper amount of damages.<sup>331</sup>

Applying Texas law, the appellate court noted that Chevron had the legal right "to use as much of the surface estate as is reasonably necessary to comply with the terms of the lease and to carry out its purpose."<sup>332</sup> Consequently, for the plaintiffs to recover, "they must establish that this water and soil contamination was the result of either Chevron's specific acts of negligence or Chevron's use of more of the [plaintiff's] surface estate than was reasonably necessary to carry out its oil operations."<sup>333</sup>

The plaintiffs relied on the testimony of two expert witnesses to prove that Chevron had polluted the plaintiffs' water wells.<sup>334</sup> One expert witness attempted to explain, using three different theories, how the salt water Chevron injected managed to reach the water wells, which were located one-half mile above the injection zone.<sup>335</sup> According to the court, while the expert's testimony established what could have occurred, there was no evidence to show what actually had occurred.<sup>336</sup> For example, the expert did not provide any evidence establishing the nexus between Chevron's water injection operations and the water well pollution.<sup>337</sup> Furthermore, the expert failed to address the possibility that sources other than Chevron caused the salt water contamination.<sup>338</sup> Although the expert's testimony raised suspicions about Chevron's operations in the area, the court noted that suspicions alone are not enough to present a question of fact to the jury on the issue of causation.<sup>339</sup>

The plaintiffs' second expert witness attempted to address what hap-

---

327. *Id.* at 581-82.

328. *Id.* at 582.

329. *Id.*

330. *Id.*

331. *Id.* at 581.

332. *Id.* at 583.

333. *Id.*

334. *Id.* at 584.

335. *Id.*

336. *Id.* at 585-87.

337. *Id.* at 587.

338. *Id.*

339. *Id.*



pened to the injected salt water once it reached the water aquifer.<sup>340</sup> The court stated that while the expert's "testimony [was] sufficient to support a finding that salt water" originating from Chevron's injection wells "could have reached the" plaintiffs' water wells, the expert's findings failed to establish causation.<sup>341</sup> For example, the expert failed to perform any field tests to determine the source of the pollution, instead preferring to rely upon the first expert witness's assumption that Chevron's wells were the cause of the contamination.<sup>342</sup> Because the expert failed to independently verify the source of pollution, the court reasoned that his testimony cannot support a finding that Chevron caused the water well contamination.<sup>343</sup>

In addition, the expert failed to determine the actual size of the contamination in the aquifer, and his estimates, which ranged from 1/4 mile to 1/2 mile in width, were too speculative and wide-ranging for a jury to use in calculating damages to the aquifer.<sup>344</sup> Furthermore, the expert's "own testimony revealed that the level of contamination in the [aquifer] was fluctuating," even long after Chevron had ceased injections.<sup>345</sup> Thus, although the plaintiffs claimed that the alleged damages to the aquifer were permanent, the expert's own testimony suggested otherwise, thereby unacceptably forcing a jury to speculate as to the extent of the damages to the aquifer.<sup>346</sup>

The plaintiffs also relied on the testimony of two other expert witnesses to prove that Chevron had negligently contaminated the soil of the plaintiffs' ranch from leaking oil pipelines.<sup>347</sup> Both witnesses attempted to show Chevron's responsibility for the pollution and the extent of the applicable damages.<sup>348</sup> However, the court held that "a reasonable jury could not conclude that Chevron was responsible for the soil contamination based solely on the testimony of these two experts," and furthermore, "could not determine the extent of any damages . . . without resorting to speculation."<sup>349</sup>

For example, the court noted that one expert witness admitted that he could not determine the exact date on which the contamination occurred and that other oil companies could have in fact caused the soil contamination.<sup>350</sup> Likewise, the second expert witness merely took a few isolated sample readings from each contamination site and used this data to extrapolate the overall extent of the soil pollution.<sup>351</sup> Yet the expert's testi-

---

340. *Id.*

341. *Id.* at 587-88.

342. *Id.* at 588.

343. *Id.*

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 588-89.

349. *Id.* at 589.

350. *Id.*

351. *Id.* at 590.

mony, in which he admitted “that the depth of the oil contamination depended upon the length of time the oil had to seep into the soil as well as variations in the soil,” undermined the reliability of his own method.<sup>352</sup> Furthermore, the expert relied upon rudimentary methods to determine the extent of pollution, such as relying solely upon visual observations to ascertain the perimeter of each pollution area.<sup>353</sup> The court thus held that both expert witnesses failed to establish a legally sufficient evidentiary basis for a reasonable jury to find for the plaintiffs’ soil pollution claims.<sup>354</sup> “[A]ny finding of liability would require the jury to speculate as to both the cause of the pollution and the extent of the damage to the surface estate.”<sup>355</sup> Thus, finding that the plaintiffs failed to present sufficient evidence establishing causation and damages, the court affirmed the trial court’s dismissal of the plaintiffs’ claims.<sup>356</sup>

*Trail Enterprises, Inc. v. City of Houston*<sup>357</sup> considers whether a city ordinance banning drilling operations around Lake Houston is an inverse condemnation of the mineral lessee’s rights in the land. Prior to the 1996 annexation of the land around the lake, Houston adopted a city ordinance prohibiting drilling in the “control area” around Lake Houston.<sup>358</sup> The control area included most, if not all, of Trail Enterprises’ 985-acre mineral leasehold.<sup>359</sup> Trail Enterprises asserted that the ordinance was an inverse condemnation.<sup>360</sup> An inverse condemnation is a cause of action asserted by a property owner claiming compensation for a government taking of property for public use without a condemnation proceeding or paying adequate compensation.<sup>361</sup>

One of the grounds for a compensable regulatory taking is that the restrictions imposed either “(a) deny property owners all economically viable use of their property, or (b) unreasonably interfere with property owners’ rights to use and enjoy their property.”<sup>362</sup> “Determining whether all economically viable use of a property has been denied entails a relatively simple analysis of whether value remains in the property after the governmental action.”<sup>363</sup> “[D]etermining whether the government has ‘unreasonably interfered’ . . . requires a consideration of the economic impact of the regulation and the extent to which the regulation interferes with distinct ‘investment-backed expectations.’”<sup>364</sup> The “economic impact” in this context merely compares the value that has been

---

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Trail Enters., Inc. v. City of Houston*, No. 14-02-00441-CV (Tex. App.—Houston [14th Dist.] 2002, no pet.) (not designated for publication), 2002 WL 389448, at \*1.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.* at \*1 n.1.

362. *Id.* at \*2.

363. *Id.*

364. *Id.*

taken with the value that remains.<sup>365</sup> It is the existing and permitted uses of the property that are considered, not anticipated gains or potential future profits.<sup>366</sup>

In this case, the court reversed and remanded the summary judgment for the City of Houston because "conflicting [expert] affidavits create[d] a fact issue," and because there was no summary judgment evidence on whether Trail Enterprises "could realize an economic benefit from the entirety of its lease, despite the drilling prohibition."<sup>367</sup>

*Walton v. Phillips Petroleum Company*<sup>368</sup> considers when suit must be brought for alleged groundwater contamination from saltwater pits. In 1998, Walton filed suit against Phillips Petroleum Company and other oil companies, alleging that their operation of open saltwater pits had contaminated the groundwater beneath his ranch in Midland County.<sup>369</sup> Walton also alleged that the defendants had failed to prevent the migration of pollutants from the [saltwater] pits to the groundwater. Phillips prevailed on its motion for summary judgment, alleging Walton's claim was barred by the statute of limitations, that his damages, as a matter of law, were permanent and not temporary, and that there was no evidence of causation.<sup>370</sup>

A suit for damages to land is subject to a two-year statute of limitations.<sup>371</sup> Ordinarily, the statute of limitations begins to run when a particular cause of action accrues.<sup>372</sup> Determining the accrual date is often the most critical issue. Although determining what rule of accrual to apply is a question of law, the cause of action "accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later."<sup>373</sup> In determining when a cause of action for damages to land "accrues," a distinction must be drawn between a claim based upon permanent damages and one for temporary damages.<sup>374</sup> Causes of "action for permanent damages to land accrue . . . upon the date of discovery of the first actionable injury, not on the date the damages to the land are fully ascertainable."<sup>375</sup> "Thus, an action to recover damages for permanent injury to land must be brought within two years from the date of discovery of the initial injury."<sup>376</sup> However, actions "to recover damages for temporary injuries, because they are transient in nature, may be brought for those injuries sustained within two years prior to the filing of the

---

365. *Id.* at \*2 n.5.

366. *Id.*

367. *Id.* at \*3 n.8.

368. *Walton v. Phillips Petroleum Co.*, 65 S.W.3d 262 (Tex. App.—El Paso 2001, pet. denied).

369. *Id.* at 267.

370. *Id.*

371. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2002).

372. *Walton*, 65 S.W.3d at 271.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.*

suit.”<sup>377</sup> Recovery for groundwater contamination for “temporary” injuries would be limited to the last two years, while a claim for “permanent” injuries would be lost, if not brought within the first two years.

The continuum of an injury determines whether the injury is permanent or temporary.<sup>378</sup> “[A] permanent injury is constant and continuous;” a temporary injury is “sporadic and contingent upon some irregular force such as rain.”<sup>379</sup> When an injury is permanent, “the damages resulting from it should all be estimated in one suit;” however, damages from temporary injuries may be brought in successive actions as they occur.<sup>380</sup> To determine whether an injury is permanent or temporary, “it is helpful to first focus on the activity causing the injury and then the injury itself.”<sup>381</sup>

The summary judgment evidence produced by Phillips showed that prior to the late 1960’s, oil and gas producers used saltwater pits to dispose of the waste water generated during oil production.<sup>382</sup> However, in the late 1960’s, the Texas Railroad Commission, concerned about groundwater contamination from surface disposal of produced water, issued what is commonly referred to as a “no pit” order which prohibited use of these pits.<sup>383</sup> The oil companies, in response to the “no pit” order, backfilled the saltwater pits located on and near Walton’s property.<sup>384</sup> By backfilling the pits, the pits were removed as a source of groundwater contamination because they no longer contained standing water, which had previously dissolved the contaminated material which would eventually flow into the groundwater. Whatever small amounts of water the pits were exposed to after they were backfilled would percolate rapidly without picking up any contamination.<sup>385</sup> Thus, any “contamination of Walton’s groundwater [by Phillips] occurred in the 1960’s during Phillips’ active operation of the open pits,” and any “additional contamination from the pits ceased when they were backfilled.”<sup>386</sup>

Noting that the activity which caused the initial contamination of the groundwater was the operation of the open pits, the court, relying upon two Texas Supreme Court cases,<sup>387</sup> held that such activity was a continu-

---

377. *Id.* at 271-72.

378. *Id.* at 272.

379. *Id.*

380. *Id.* at 272-73.

381. *Id.* at 273.

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.* at 275.

387. *Id.* at 273 (relying on *Tenn. Gas Transmission Co. v. Fromme*, 269 S.W.2d 336 (Tex. 1954) (holding damage resulting from a continuous flow of polluted water on the plaintiff’s land for four years constituted permanent damages as a matter of law, as the cause of action arose at the time the water began flowing onto the property and not when the extent of the damages became fully ascertainable some time later) and *Vann v. Bowie Sewerage Co., Inc.*, 90 S.W.2d 561 (Tex. 1936) (holding damages resulting from a septic tank which continuously discharged polluted water into a creek constituted permanent damages)).

ous source of pollution.<sup>388</sup> Furthermore, because "there [was] no evidence that the contamination was ever non-existent or significantly diminished due to a change in circumstances," the injury cannot be a temporary one and instead must permanent in nature.<sup>389</sup> Consequently, "Walton was required to bring his causes of action within two years of the initial injury," which would have "accrued no later than the late 1960's."<sup>390</sup>

Walton argued that the statute of limitations should not bar his claims due to the Discovery Rule, the continuing tort doctrine, and because Phillips engaged in fraudulent concealment.<sup>391</sup> The court disagreed.<sup>392</sup> The court held that the Discovery Rule did not apply in this case because Walton knew by 1993 that some groundwater contamination had occurred.<sup>393</sup> In 1993, Walton contacted the Texas Water Commission to inquire about concerns regarding his groundwater.<sup>394</sup> The Water Commission's analysis showed contamination to a certain depth and recommended further testing to determine the lower limits of the contamination.<sup>395</sup> Noting that such information "would cause a reasonably prudent person to make inquiry into whether his groundwater had been contaminated," and because "knowledge of facts that could cause a reasonably prudent person to make an inquiry that would lead to discovery of the cause of action is, 'in the law, equivalent to knowledge of the cause of action for limitations purposes,'" the court held that Walton's claims were barred by the statute of limitations because he failed to bring his claims within two years of discovering the contamination, in 1993.<sup>396</sup> The court held that "because Walton's injury was permanent, the continuing tort doctrine [did] not apply."<sup>397</sup>

Finally, fraudulent concealment did not apply because Phillips, in back-filling the open pits, was using a "recommended method to remediate the open pits."<sup>398</sup> Relying upon a recommended method "does not qualify as deception to conceal a tort," and regardless, because "Walton knew in 1993 that some contamination had occurred," any reliance by Walton after 1993 "on the alleged deception would have been unreasonable."<sup>399</sup> Consequently, the court held that "any tolling effect would have ended in 1993 with Walton's discovery of the contamination."<sup>400</sup>

---

388. *Id.* at 274.

389. *Id.*

390. *Id.* at 274-75.

391. *Id.* at 274-76.

392. *Id.*

393. *Id.* at 275-76.

394. *Id.*

395. *Id.*

396. *Id.* (quoting *Walton v. City of Midland*, 94 S.W.3d 853, 859 (Tex. App.—El Paso 2000, no pet.)).

397. *Id.*

398. *Id.* at 275.

399. *Id.*

400. *Id.*

## VIII. LITIGATION

*Bristol v. Placid Oil Co.*<sup>401</sup> holds that the mandatory venue provision of Texas Civil Practice and Remedy Code Ann. section 15.011<sup>402</sup> applies in suits for a constructive trust “on the revenue received from the [oil] well in question *and the lease*.”<sup>403</sup> A mineral “lease” is an interest in land or realty, and a demand for a constructive trust is an attempt to recover an interest in “realty.”<sup>404</sup>

*Hutchison v. Union Pacific Resources Co.*<sup>405</sup> holds that a trespass and conversion claim for taking oil by production is subject to the two-year statute of limitations.<sup>406</sup> The court noted that the discovery rule is not applicable to drainage claims from a common oil or gas reservoir, because such drainage is not an “inherently undiscoverable injury.”<sup>407</sup> The court reasoned that an “act of conversion implies a necessary trespass to complete the taking” and, therefore, “a trespass claim accompanying a conversion . . . would also not be inherently undiscoverable.”<sup>408</sup>

*Stirman v. Exxon Corp.*<sup>409</sup> reverses the trial court’s certification of a class action alleging lessee breached the implied covenant to market gas.<sup>410</sup> Plaintiffs contended that Exxon transferred natural gas within its own divisions at a lower price than the price realized in third party sales, causing the royalty owners to receive lower royalty payments.<sup>411</sup> The plaintiffs sought to certify a class under Federal Rule of Civil Procedure 23 (“Rule 23”).<sup>412</sup> The trial court certified a class consisting of all royalty owners in the continental United States, where Exxon was the lessee, under both proceeds and market value leases, and whose gas was transferred to an Exxon affiliate during the relevant time period.<sup>413</sup> The class would include over 13,000 natural gas leases and 67,904 unique interest owners.<sup>414</sup>

Exxon argued that the named plaintiff Hunter’s claims were not “typical” of the claims of the class.<sup>415</sup> In *Yzaguirre v. KCS Resources, Inc.*,<sup>416</sup> the Texas Supreme Court held that there is no implied covenant to market in market value leases, because these leases have their own express

---

401. *Bristol v. Placid Oil Co.*, 74 S.W.3d 156 (Tex. App.—Amarillo 2002, no pet.).

402. TEX. CIV. PRAC. & REM. CODE § 15.001 (Vernon 1986).

403. *Bristol*, 74 S.W.3d at 158 (quoting *Talley v. Howsley*, 142 Tex. 81, 176 S.W.2d 158, 160 (1943)) (emphasis in original).

404. *Id.*

405. *Hutchison v. Union Pacific Res. Co.*, No. 03-01-00196-CV (Tex. App.—Austin, pet. denied) (not designated for publication), 2001 WL 1337888.

406. *Id.* at \*1.

407. *Id.* at \*3.

408. *Id.*

409. *Stirman v. Exxon Corp.*, 280 F.3d 554 (5th Cir. 2002).

410. *Id.* at 557-58.

411. *Id.* at 557.

412. *Id.* at 557-58.

413. *Id.* at 557.

414. *Id.* at 559.

415. *Id.* at 562.

416. *Yzaguirre v. KCS Res., Inc.*, 53 S.W.3d 368, 373 (Tex. 2001).

covenant.”<sup>417</sup> However, there is such an implied covenant in a proceeds lease.<sup>418</sup> “Therefore, in a class action based on alleged breach of an implied covenant to market, there cannot be typicality where there are both market value and proceeds leases included in the class, at least under Texas law.”<sup>419</sup> The Plaintiffs argued that because Hunter had both forms of leases, Hunter was typical of the class. However, Rule 23 requires that the claims be typical, not the plaintiff.<sup>420</sup> Therefore, Hunter’s claims were not “typical” of the class as defined.<sup>421</sup> The court expressly approved the reasoning in *Phillips Petroleum Co. v. Bowden*,<sup>422</sup> which decertified a class including both market value and proceeds leases, after the decision in *Yzaguirre*.<sup>423</sup>

The court also rejected the certification under Rule 23(a)(4) (requiring adequacy of representation), because the trial court failed to consider the adequacy of Hunter (the named plaintiff) as a class representative.<sup>424</sup> Moreover, the court noted that it was unlikely that Hunter could meet the test because her claims were not typical. Because she had both forms of leases, one could be more valuable than the other, and it was possible that the different states had different applicable statutes, such as the statute of limitations.<sup>425</sup>

The court also rejected the trial court’s analysis under Rule 23(b)(3) (whether common questions of law or fact predominate over individual questions) because the “differences in the law of the jurisdictions at issue demonstrate that the law is not uniform as to any implied covenant to market, or at least that the plaintiffs have not demonstrated uniformity.”<sup>426</sup> This required that the “states whose law is at issue must [at least] recognize an implied covenant to market, which [was] the heart of this class action.”<sup>427</sup> The court analyzed the law in all of the states considered, and it found that the implied covenant to market was different among the states recognizing the covenant, and that five of the states had not actually determined that such a covenant is implied.<sup>428</sup> On remand, “plaintiffs would have to show uniformity [as] to all relevant aspects of states’ laws.”<sup>429</sup>

Finally, the court rejected the class certification because the trial court failed to consider whether a class action was a superior method for adju-

---

417. *Stirman*, 280 F.3d at 562.

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.*

422. *Phillips Petroleum Co. v. Bowden*, No. 14-00-01184-CV (Tex. App.—Houston [14th Dist.] Oct. 18, 2001, no pet. h.) (not designated for publication), 2001 WL 1249995, at \*1-2.

423. *Stirman*, 280 F.3d at 562 n.6.

424. *Id.* at 563.

425. *Id.* at 562 n.7.

426. *Id.* at 566.

427. *Id.* at 564.

428. *Id.* at 564-66.

429. *Id.* at 565 n.22.

dicating this controversy.<sup>430</sup>

*Taub v. Houston Pipeline Co.*<sup>431</sup> considers the application of the Discovery Rule to causes of action related to surface usage by lessee. The Bammel Field was converted to a gas storage facility under a Unitization Agreement and a separate Collateral Agreement.<sup>432</sup> The operator surrendered many of the rights derived from the original lease, but retained certain surface locations necessary to the storage operations. The operator's right to use the well sites was subject to abandonment and termination under the Collateral Agreement.<sup>433</sup> Taub raised various breach of contract claims related to the use of the well sites.<sup>434</sup>

Houston Pipeline raised the affirmative defense that the statute of limitations had passed.<sup>435</sup> Taub contended that as to the breach of contract action the Discovery Rule applied.<sup>436</sup> The "Discovery Rule" is an exception to the general rule that an action does not accrue until a plaintiff knew, or in the exercise of reasonable diligence should have known, of the wrongful act and resulting injury.<sup>437</sup> "The alleged injury involved tangible things: oil and gas, exploration activities occurring on the surface of land located in a metropolitan area. Whether drilling equipment is located on the surface area is readily apparent by the mere viewing."<sup>438</sup> The court held that "the injury alleged in this case [was] not inherently undiscoverable" and, therefore, the Discovery Rule did not apply.<sup>439</sup> The court noted that diligence is required of the surface owner, which goes beyond mere observation, requiring inquiry, and that forms filed with the Railroad Commission could also provide notice.<sup>440</sup> The court also seemed to hold these lessors to a higher standard because they were "sophisticated and active participants in oil and gas matters."<sup>441</sup> Similarly, Taub's claim of fraudulent concealment to toll the running of the statute as to the contract claims was denied because the well sites were in plain view.<sup>442</sup> Taub's trespass claims were also barred by limitations, and the court rejected any application of the Discovery Rule to preserve these claims.<sup>443</sup>

---

430. *Id.* at 566.

431. *Taub v. Houston Pipeline Co.*, 75 S.W.3d 606 (Tex. App.—Texarkana 2002, pet. denied).

432. *Id.* at 612.

433. *Id.* at 612-13.

434. *Id.* at 614.

435. *Id.* at 618.

436. *Id.* at 618-19.

437. *Id.* at 619.

438. *Id.*

439. *Id.*

440. *Id.* at 619-20.

441. *Id.* at 620.

442. *Id.*

443. *Id.* at 620-21.



